Supreme Court, U.S.
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No. 99-1489

In The

Supreme Court of the United States

RAQUEL, a partnership,

Petitioner,

v.

EDUCATION MANAGEMENT CORPORATION, ART INSTITUTES INTERNATIONAL, INC., GEFFEN RECORDS, INC., NIRVANA, a partnership, ELIAS/SAVION, INC. and PHILIP ELIAS, individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The relevant opinions, orders and memoranda are attached to the Petition for Writ of *Certiorari*. The opinion of the United States Court of Appeals for the Third Circuit is reported at 196 F.3d 171 (3d Cir. 1999).

JURISDICTION

The Third Circuit issued its judgment on November 9, 1999, with Judges Sloviter and Alarcon (who was sitting by designation from the Ninth Circuit) joining in the majority, and Judge Alito issuing a dissent. The Third Circuit denied Raquel's petition for rehearing on December 10, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1541(1).

STATUTES AND REGULATIONS INVOLVED

The Third Circuit relied upon 17 U.S.C. § 411(a), 17 U.S.C. § 101, 17 U.S.C. § 102(a)(2), 17 U.S.C. § 408(d), and 37 C.F.R. § 201.5(b).

ISSUE

Whether federal courts are required to enforce the Congressional mandate that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a).

INTRODUCTION

This case does not present a controversy in federal copyright law. All Circuits are in agreement about the copyright law at issue; the majority and the dissent in the Third Circuit were in agreement about the fundamental principles of the law. Simply stated, the law is that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). Raquel did not register a copyright in the allegedly infringed work (a song) that its lawsuit is about. Rather, Raquel registered a copyright in an "audio-visual work" (a television commercial) that was authored by Philip Elias, a defendant in this case.

The case was dismissed once for this failure to obtain a copyright in the allegedly infringed song. The district court instructed very clearly that "in order to bring an action in federal court, the plaintiff must have first filed a valid federal copyright registration in the work upon which he or she has based the infringement claim. 17 U.S.C. § 409. The failure to satisfy this jurisdictional prerequisite deprives a federal court of subject matter jurisdiction." *Raquel v. Education Management Corporation*, 955 F.Supp. 433, 439 (W.D.Pa. 1996). Faced with that warning, Raquel filed a "supplementary registration" seeking to "amplify" its original registration of the "audiovisual work". But the law is clear that a supplementary registration cannot be used to bootstrap one copyright onto another:

> 37 C.F.R. § 201.5(b)(1) Supplementary registration may be made only if a basic copyright registration for the same work has already been

> completed. After a basic registration has been completed any author or other copyright claimant of the work, or the owner of such exclusive right in the work, or the duly authorized agent of any such author, other claimant, or owner who wishes to correct or amplify the information given in the basic registration form for the work may file an application for supplementary registration. . . . (2) Supplementary registration may be made either to correct or to amplify the information in the basic registration . . . (i) A correction is appropriate if the information in the basic registration was incorrect . . . (ii) an amplification is appropriate: (A) to reflect additional information . . . (B) To reflect changes in facts . . . (C) To clarify information. . . . **(iii) Supplementary registration is not appropriate . . . (B) to reflect changes in the content of a work. . . .**

Under this Court's precedent, such "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). An agency's interpretation of its own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). "This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.' " *Id.*

In declining to permit this case to proceed when the copyright registration was in an "audiovisual work" rather than in the allegedly infringed song, the Third Circuit simply refused to override the regulatory scheme embodied in 17 U.S.C. § 411(a) and 37 C.F.R. § 201.5(b)(1). If this Court were to hear this case, the only means to reverse would be to override that regulatory scheme, something that would be a dramatic break from precedent. *See Chevron*. Even the dissent in the Third Circuit did not propose that course. Rather, the dissent relied upon the same fundamental statements of federal copyright law as are included in the majority opinion (although the dissent would have applied the law differently to the facts). The dissent breaks from the majority by suggesting that the district court made "findings" when it dismissed the first case, with those "findings" becoming "the law of the case". (App. 23a and 24a). That sort of analysis is not available to this Court, however, because there were no "findings" in the first case; there was not even an evidentiary hearing. If this Court were to defer to "findings" from the first case when there was neither an evidentiary hearing nor actual "findings", it would certainly dilute this Court's vast body of precedent under Rule 52, F.R.C.P. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564 (1985). Judge Alito's proposed deference to "findings" that do not exist may be viewed simply as a vehicle of dissent that could not become a part of the jurisprudence of the United States Supreme Court.

STATEMENT OF THE CASE

Raquel performed a small portion of the song "Pop Goes the Music" as part of a television commercial that advertised the Art Institute's music management business. (App. 2a). In consideration for its performance in the commercial, the The Art Institute permitted Raquel to use for limited promotional purposes a full length music video (essentially out-takes of the television commercial). (App. 2a). It has never been disputed that Philip Elias was the author of both the music video and of the television commercial, *i.e.*, the audiovisual work. (App. 4a). Indeed, the purported agreement that is attached as Exhibit 2 to the Amended Complaint provides that "Elias/Savion will have sole right of creative decisions in regard to the final editing of all video mixes resulting from the shoot." (App. 64a). The purported agreement left no doubt as to the ownership of the audiovisual work: "Raquel reserves the right to use the song/video for the purpose of self promotion, in compliance with this agreement. Written permission from Elias/Savion Advertising is required prior to the release of song/video to any commercial source. Permission/Refusal must be granted within 30 days of notice." (See App. 65a).

The nationally known rock band Nirvana became aware of the Art Institute's television commercial because it had been played on MTV. Nirvana asked for permission to use a portion of the commercial in a music video and permission was granted. (App. 3a). Raquel, which performed in the television commercial, attempted to obtain a copyright registration in the commercial, and filed a federal lawsuit against the Art Institute for its role in

permitting Nirvana to use a portion of the commercial in its music video. (App. 4a). The Art Institute filed a third party claim against Philip Elias. (App. 3a).

After entering the case, Philip Elias filed an affidavit in which he claimed authorship of the audiovisual work that formed the jurisdictional basis of Raquel's complaint, and moved to dismiss on that basis. (App. 4a); *see also: Raquel v. Education Management Corp.*, 955 F.Supp. 433 (W.D.Pa. 1996). Raquel did not dispute Mr. Elias' claim that he had authored the audiovisual work. *Id.* at 437. The court dismissed the case without prejudice, determining that Raquel should have another chance to seek a registration for any portion of its work that may have appeared in the commercial, and to file a lawsuit based on its own work. (App. 4a).

Raquel then filed with the federal copyright office a supplement to its registration of Mr. Elias' audiovisual work. (App. 5a). By virtue of the supplement, Raquel continued to claim authorship of Mr. Elias' audiovisual work. (App. 5a). It attempted only to amplify its description of the work by depositing with the copyright office "Two copies of 'Video' of RAQUEL performing song, 'POP GOES THE MUSIC' now being filed separately with this amendment." (App. 5a). In a space on the official form requesting an "Explanation of Amplified Information", Raquel wrote: "Original filing was made with videocassette which contained 'Video' of Raquel performing song, 'POP GOES THE MUSIC', and also contained other items as to which claimant does not assert a copyright." (App. 5a). In essence, Raquel amplified its registration of the "audiovisual work" by depositing two music videos of itself playing the song "Pop Goes the Music" to go

along with its previous deposit of Mr. Elias' commercial. It has never been disputed that Mr. Elias was the author of the music video. (App. 4a).

Raquel filed a new complaint which at first glance seemed to seek recovery for copyright infringement for any portions of the song "Pop Goes The Music" that were discernible in the Nirvana video. But a careful reading of the complaint revealed that Raquel continued to claim authorship of the audiovisual work that belonged to Mr. Elias. (App. 5a). Perhaps more importantly, the copyright registration that served as the jurisdictional basis for the complaint continued to attribute to Raquel authorship of Mr. Elias' audiovisual work. (App. 5a). The court at first was reluctant to dismiss because the face of the complaint made more clear reference to Raquel's song. (App. 5a). But when it was pointed out to the court that even with certain cosmetic changes on the face of the complaint, Raquel continued to base jurisdiction on a claim of ownership in Mr. Elias' audiovisual work, the court dismissed with prejudice. (App. 5a). The United States Court of Appeals affirmed that judgment. (App. 1a-33a).

ARGUMENT

THE PETITION FAILS TO ESTABLISH ANY OF THE ELEMENTS REQUIRED TO GRANT *CERTIORARI* UNDER RULE 10 OF THE RULES OF THE UNITED STATES SUPREME COURT

1. The Third Circuit's Opinion Does Not Create a Conflict in the Circuits

In its Petition, Raquel claims that the Third Circuit's opinion is in conflict "with the decisions of the First, Second, Sixth and Ninth Circuits. . . . " (Petition at 21). That is not true: All federal circuits are in agreement that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). All Circuits also agree that "an inadvertent and immaterial misstatement will not invalidate a copyright registration. . . . " (App. 10a). The Third Circuit cited that law in reaching its result. (App. 10a). But the Third Circuit instructed – and all other Circuits would say the same if faced with this question – that a plaintiff cannot obtain a copyright registration in an audiovisual work that belongs to someone else, and then file a lawsuit for infringement of a separate and distinct work.[1]

It certainly was not within the authority of the Third Circuit to hold otherwise. To permit Raquel to proceed

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[1] The Court should note that Judge Alarcon – who was sitting by designation from the Ninth Circuit (a court that Petitioner claims is in conflict with the Third Circuit) – fully reviewed the briefs, participated in oral argument, and joined the majority opinion affirming the district court's dismissal for lack of subject matter jurisdiction.

with its complaint when it never registered a copyright in the allegedly infringed song would create an exception to 17 U.S.C. § 411(a). It would be the one and only case where a federal court permitted a copyright plaintiff to proceed with a lawsuit even though no "registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). None of the cases that the Petitioner cites from the "First, Second, Sixth and Ninth Circuits" stand for the proposition that a plaintiff can proceed with a copyright lawsuit without first obtaining a copyright registration in the allegedly infringed work. Any such holding would certainly contradict 17 U.S.C. § 411(a).

Given that there is agreement in the Circuits about basic copyright law, there is no compelling reason to grant this Petition under Rule 10. The only thing novel about this case is its facts: Raquel once obtained a copyright in an "audiovisual work" that belonged to someone else, and when informed of the error when the case was dismissed, Raquel repeated the error in its second lawsuit. It may have been possible to deem the error "inadvertent" the first time; it certainly was not possible to do so the second time. The Third Circuit distinguished this fundamental failure to register a copyright in the allegedly infringed work from inadvertent and superficial omissions that are sometimes excused in the copyright process:

> Raquel has not cited, nor have we found, a case in which the misstatement to be excused is as fundamental as the one in this case. Here Raquel misidentified the *nature* of the work in such a way as to suggest an attempted registration in a

> work not authored by the registrant, namely, the commercial advertisements authored, as the parties agree, by Elias/Savion. [Footnote omitted]. In all of the cases excusing immaterial errors the registrant had the right to the work described in the registration form. Raquel, however, does not have the right to the audiovisual work described in the registration form.

(App. 13a).

It is unlikely that any Circuit will again face a situation where a Plaintiff twice fails to obtain a copyright registration in the allegedly infringed work. If any Circuit faces that question, the Third Circuit's opinion will provide proper guidance: The failure to register the infringed work compels dismissal under the plain meaning of 17 U.S.C. § 411(a). Certainly, it would be an unnecessary tax on judicial resources to obtain a statement from this Court on an obscure factual scenario that is unlikely ever to happen again, especially when the Third Circuit has already dealt with the question in the only way the underlying legislation would permit.

2. The Error Asserted in the Third Circuit Dissent Is That the Majority Relied Upon an Erroneous Factual Finding and Thereby Misapplied an Otherwise Properly Stated Rule of Law

This Court's rules are clear that "[a] Petition for Writ of *Certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Rule 10, Supreme Court Rules). As shown above, the majority and the dissent were in basic agreement about the statement of

the law at issue. The disagreement was over how to apply that law when a Plaintiff twice failed to obtain a copyright registration in the allegedly infringed work. The dissent would have rescued the Plaintiff from its error, on the premise that the district court made "findings" in the first case that became the "law of the case". (App. 23a-24a). The majority did not take that course; indeed, contrary to the suggestion made in the dissent, there was neither an evidentiary hearing nor findings in the first case, and it would have been improper to purport to rely upon such findings.

Nevertheless, because the disagreement is not about the law but about how the facts apply to the law, this matter is particularly unfit for Supreme Court review.

CONCLUSION

The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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